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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VERNON HILL et al.,

Defendants and Appellants.

D073046

(Super. Ct. No. SCD272100)

APPEALS from judgments of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed.

Sheila Ann Quinlan, under appointment by the Court of Appeal, for Defendant and Appellant Vernon Hill.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant Isaiah Woods.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Randall D. Einhorn, Arlene A. Sevidal and Joseph Anagnos, Deputy Attorneys General, for the Plaintiff and Respondent.

A jury convicted codefendants Vernon Hill and Isaiah Woods of grand theft (Pen. Code,¹ § 487, subd. (a); counts 1, 3 & 5), robbery (§ 211; count 2) and conspiracy to commit theft (§ 182, subd. (a)(1); count 6), stemming from incidents in which they and a third person stole electronics from retail stores. The court sentenced Woods to two years four months in prison, consisting of one year (one-third the midterm) for the count 2 robbery, plus eight months each for counts 3 and 5, all consecutive to a sentence Woods was already serving in Ventura County. It stayed under section 654 Woods's two-year sentences on counts 1 and 6. The court sentenced Hill to one year in prison for count 2 consecutive to a sentence Hill was serving for a crime committed in Ventura County, and concurrent two-year sentences for each of counts 3 and 5.

Woods contends the trial court violated his Fourteenth Amendment right to due process and erroneously excluded evidence under California law by precluding questioning, evidence and argument pertaining to one of the victim's employer's internal policies and procedures. He maintains the evidence would have shown the victim of the count 2 robbery acted outside the scope of his employment by trying to physically prevent the third suspect from taking more merchandise, preventing the People from proving a necessary element of robbery: the victim's possession of personal property during the taking. According to Woods, the error is not harmless beyond a reasonable doubt because the count 2 robbery evidence was not overwhelming, the jury was deadlocked on another charge, and the scope-of-employment evidence was crucial for his

¹ Undesignated statutory references are to the Penal Code.

defense. With respect to the same robbery conviction, Woods further contends insufficient evidence supports a finding that the third man used force or fear to take the property or prevent the victim from resisting his taking, and thus the count 2 robbery conviction must be reversed. Hill joins in Woods's first argument. We affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND²

Over the course of six days in July 2015, codefendants Woods, Hill and a third person stole iPads and other merchandise from several retail establishments, including a Target store in Oceanside, after pretending to be customers interested in purchasing electronics.

One of the incidents occurred on July 6, 2015. That evening, J.C. was working in the electronics department at a Target store in Oceanside when he was approached by Woods, Hill and a third man, who he described as a big guy that "looked like a linebacker for the Chargers."³ One of the men was holding a tablet. The men asked J.C. about which iPads had the most memory and whether the store was having a sale on them. J.C. conversed with the man holding the tablet, who asked him to open the case. Feeling the men were legitimate customers, J.C. opened the case, then started to get "real nervous" when he realized the men were "starting to close in" on and "surround[]" him. He was

² The sole conviction at issue is the robbery of count 2, so we detail the facts only as to that offense. The jury deadlocked on count 4, which was a charged robbery of a Walmart employee, and the court dismissed that charge.

³ The jury was shown surveillance footage taken at the Oceanside Target, which was then admitted into evidence.

nervous of "[p]ossibly getting hit or robbed" and his "heart was pounding." The men started to rummage through the cabinet, then Woods and Hill ran away with iPads. The third large man was nudging J.C. out of the way, and "kind of bullied his way closer to the case" with his elbow out, "chicken wing style." J.C. described the man as "kind of knock[ing] me out of the way [of the display case] with his elbow" or "elbow[ing] me out of the way." J.C. agreed that the man's "force helped him to accomplish that theft." J.C. grabbed the man in an effort to detain him and stop him from taking more items, but the man resisted and J.C. gave up; the man was able to shrug out of J.C.'s grasp and ran out of the store. The men ended up leaving with four or five iPads worth \$3,000 to \$4,000.

DISCUSSION

I. The Court Did Not Abuse its Discretion by Excluding Evidence of Target's Internal Employee Policies and Procedures

A. Background

Before trial, the People moved in limine to exclude defense questioning, evidence and argument pertaining to Target's internal corporate policy prohibiting non-asset protection employees from physically intervening during a theft. The People argued the evidence was irrelevant because under *People v. Scott* (2009) 45 Cal.4th 743, J.C. had a possessory interest in the stolen electronics as a matter of law regardless of his duties or the scope of his employment, and any Target policy or disciplinary action against him would merely confuse the jury about the true issue before them. During arguments on the matter, defense counsel asked the court to permit one or two questions on the issue, but admitted he did not have case law on the question. Counsel argued that the relationship

between employer and employee would "break[] down" if the employee stepped outside the scope of his employment.

The court granted the People's motion to exclude the evidence. It found the policy at issue was adopted by stores to protect themselves from civil liability "but it doesn't change the status of the person being employed, and there's no indication that the person isn't on duty or an employee just because they choose to take a more active role against the shoplift, which is what we have here." The court observed that the only potential relevance would be if the employee were to minimize or potentially downplay what he did because he was worried about the ramification for the employer, but it felt no party had raised such an issue. The court stated: "[T]he position that the defense has taken is that they acted outside of the scope, and the witness is under the impression that he was written up for it, and therefore I don't see how that's going to be a factor or a bias or a prejudice in such a way that it then becomes relevant for purposes of evaluating the credibility of the particular witness."

Though the court ruled the matter was potentially relevant for purposes of witness credibility, it then reiterated it was not "relevant in any other possible way that they acted outside the scope of the policies of the particular store." The court further disagreed with counsel's interpretation of the facts as showing J.C. was acting outside the scope of his employment.

B. *Standard of Review*

We review the trial court's evidentiary rulings, including whether evidence is more prejudicial than probative, under the deferential abuse of discretion standard. (*People v. Clark* (2016) 63 Cal.4th 522, 572.) Under this standard, we will not reverse " 'unless " 'the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " ' " (*Ibid.*) Further, we assess the trial court's ruling, not its reasoning, and affirm if it is correct on any ground. (*People v. Brooks* (2017) 3 Cal.5th 1, 39; *People v. Zapien* (1993) 4 Cal.4th 929, 976 [" ' "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for the wrong reason. If right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion" ' "].)

C. *Analysis*

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Robbery victims must be in some sense in possession of the property; but "neither ownership nor physical possession is required to establish the element of possession for the purposes of the robbery statute" (*People v. Scott, supra*, 45 Cal.4th at p. 749) and thus constructive possession will suffice. (*People v. Fiore* (2014) 227 Cal.App.4th 1362, 1385.)

Defendants contend that evidence of J.C.'s scope of employment, and thus the Target store policy, was relevant and had significant probative value to their defense, which was that J.C. lacked possession of Target's personal property at the time of the taking. They acknowledge that the California Supreme Court in *Scott, supra*, 45 Cal.4th 743 held that the concept of constructive possession extends to employees of businesses; they characterize the court's holding as stating, "all employees *who are performing their duties of employment* are deemed to have constructive possession of their employer's goods." According to defendants, notwithstanding *Scott*, the scope of an employee's duties is relevant on the issue of constructive possession of their employer's goods, as evidenced by cases such as *Curtis v. Beard* (2015 C.D. Cal.) 2015 WL 4537877.

Under the foregoing review standards, defendants have not established the court abused its discretion. They misstate the holding of *People v. Scott, supra*, 45 Cal.4th 743, which squarely agreed with case law establishing that " 'employees working at a business premises [are] in constructive possession of the employer's property during a robbery, based upon their status as employees and *without examining whether their particular duties involved access to or control over the property taken.*' " (*Scott*, at p. 752, italics added, quoting *People v. Jones* (2000) 82 Cal.App.4th 485, 490.) The *Scott* court explained: "Although not every employee has the authority to exercise control over the employer's funds or other property during everyday operations of the business, any employee has, by virtue of his or her employment relationship with the employer, some implied authority, when on duty, to act on the employer's behalf to protect the employer's property when it is threatened during a robbery. '[E]mployees are custodians of the

property on the business premises for the benefit of the owner/employer,' [citations]. They are 'therefore in "possession" of the property as against anyone who might attempt to steal it.' [Citation.] . . . [T]he employee's relationship with his or her employer constitutes a 'special relationship' sufficient to establish the employee's constructive possession of the employer's property during a robbery. [¶] Furthermore, it is reasonable to infer that the Legislature intended that all on-duty employees have constructive possession of the employer's property during a robbery, because such a rule is consistent with the culpability level of the offender and the harm done by his or her criminal conduct. . . . On-duty employees generally feel an implicit obligation to protect their employer's property, and their sense of loss and victimization when force is used against them to obtain the employer's property is unlikely to be affected by their particular responsibilities regarding the property in question." (*People v. Scott, supra*, 45 Cal.4th at pp. 754-755.) In reaching its conclusion, the California Supreme Court observed that "those who commit robberies are likely to regard all employees as potential sources of resistance, and their use of threats and force against those employees is not likely to turn on fine distinctions regarding a particular employee's actual or implied authority." (*Id.* at p. 755.)

Under *Scott*, the scope of an employee's duties does not come into consideration in determining the issue of constructive possession. Thus, by the very fact J.C. was a Target employee on duty at the time of the robbery, he was in constructive possession of the stolen merchandise regardless of his specific job duties, and without regard to whether he had exceeded the scope of his employment. Whether J.C. acted outside the scope of his

employment was thus irrelevant to whether he had constructive possession of Target's property for purposes of robbery. *Curtis v. Beard* does not assist defendants; it expressly followed *Scott* to hold that a store manager who had left work, but returned to the store and had given the defendant paperwork immediately before he committed a robbery was still "on duty" within the meaning of *Scott* and thus had the requisite special relationship with her employer to be in constructive possession of the store's property. (*Curtis v. Beard, supra*, 2015 WL 4537877, *10.) In fact, *Curtis* held *Scott*'s holding extended to the situation even if the manager were off duty, since the defendant's argument "would be contrary to *Scott*'s focus on the defendant's culpability, *instead of the particulars of the victim's employment relationship.*" (*Ibid.*, italics added.) Here, there is no question as to whether J.C. was on duty during the time of the robbery in this case. On this basis, defendants cannot establish the court abused its discretion in excluding Target's policies and procedures to assertedly show J.C. acted outside his authority or against store policy in attempting to physically restrain anyone from taking merchandise.

II. *Sufficiency of the Evidence of Robbery*

Woods contends there is insufficient evidence to support the jury's finding that the defendants' accomplice in the robberies used force or fear to take the property from J.C. or prevent J.C. from resisting. Woods asserts that J.C. did not testify that the man made any physical contact with him either after Woods and Hill fled, or at the time the man nudged J.C. out of the way. Woods characterizes J.C.'s testimony that the man "bullied his way closer" or "kind of knocked [J.C.] out of the way" as indicating no physical touching occurred, and J.C.'s affirmative answer to the question whether the man's "force

helped him to accomplish the theft" as legally conclusory. To the contrary, Woods argues, the evidence shows J.C. initiated the physical contact and struggle, not the suspect. Woods further argues that though J.C. testified he was "nervous" after he opened the display case, J.C. "did not express that he felt 'fear' as the men had not used any threat of force against him."

When an appellant challenges a conviction based on insufficiency of the evidence, our task is to " 'review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " the jury's verdict.' " (*People v. Penunuri* (2018) 5 Cal.5th 126, 142.) Testimony of a single witness is sufficient to

support a conviction unless the testimony is physically impossible or inherently improbable. (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1362.)

" '[T]he central element of the crime of robbery [is] the force or fear applied to the individual victim in order to deprive him of his property.' That deprivation of property occurs whether a perpetrator relies on force or fear to gain possession or to maintain possession against a victim" (*People v. Gomez* (2008) 43 Cal.4th 249, 265; see also *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1707 ["It is the use of force or fear which distinguishes robbery from grand theft from the person"].) The People need not present direct proof of this element: " 'The element of fear for purposes of robbery is satisfied when there is sufficient fear to cause the victim to comply with the unlawful demand for his property.' [Citations.] It is not necessary that there be direct proof of fear; fear may be inferred from the circumstances in which the property is taken. [Citation.] If there is evidence from which fear may be inferred, the victim need not explicitly testify that he or she was afraid. [Citations.] Moreover, the jury may infer fear ' "from the circumstances despite even superficially contrary testimony of the victim." ' [Citations.] The requisite fear need not be the result of an express threat or the use of a weapon. [Citations.] Resistance by the victim is not a required element of robbery [citation], and the victim's fear need not be extreme to constitute robbery [citation]. All that is necessary is that the record show ' " 'conduct, words, or circumstances reasonably calculated to produce fear ' " ' [Citation.] Intimidation of the victim equates with fear." (*People v. Morehead* (2011) 191 Cal.App.4th 765, 774-775.) With respect to the degree of force sufficient to support a robbery conviction, " 'something more is required

than just that quantum of force which is necessary to accomplish the mere seizing of the property' "; "the degree of force need only be sufficient to overcome the victim's resistance." (*People v. Mullins* (2018) 19 Cal.App.5th 594, 604.)

Under the foregoing authority, it is not dispositive that J.C. failed to testify he was "afraid" or "fearful," or that no defendant in fact orally threatened him. (*People v. Morehead, supra*, 191 Cal.App.4th at p. 775.) As long as a reasonable jury could conclude the evidence objectively supports the fear element, we will uphold the finding. Here, J.C. described becoming "very nervous" when the defendants—including the third man who J.C. described as large as a professional football linebacker—"closed in on" and "surrounded" him; he testified his "heart was pounding" and he was nervous of "getting hit or robbed." J.C.'s testimony alone permits a reasonable inference that the emotion he felt at the time the defendants began rummaging through the display cabinet was intimidation or fear.

Though we need not decide whether the evidence was also sufficient to establish the requisite force (§ 211 [requiring either force *or* fear]; accord, *People v. McKinnon* (2011) 52 Cal.4th 610, 686), we conclude J.C.'s testimony that the third man nudged, knocked, or elbowed him out of the way, as well as J.C.'s agreement that some measure of force assisted the man in the theft, permits an inference that the man physically pushed J.C. out of the way so as to overcome any resistance and accomplish the taking. In sum, the evidence is sufficient to support the jury's verdict.

DISPOSITION

The judgments are affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.